

TRANSPORTATION DEPARTMENT[761]

Adopted and Filed

Rule making related to railroad revolving loan and grant fund program

The Department of Transportation hereby amends Chapter 822, “Railroad Revolving Loan and Grant Fund Program,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is adopted under the authority provided in Iowa Code section 307.12.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 327H.20A.

Purpose and Summary

Chapter 822 provides the guidelines under which the Railroad Revolving Loan and Grant Funds are awarded and administered. This rule making reflects changes that have been identified to improve the process to provide fiscally sound financial assistance for rail projects, speed project completion and increase accountability. Some of the specific drivers of the changes include:

- In 2011, a portion of the appropriation for the Railroad Revolving Loan and Grant Fund Program was made available for rail port planning studies. The Department found that feasibility and planning studies increased the quality of projects that were later submitted by ensuring that there were demand and cost justification for the projects to move forward and, in some cases, not to move forward. Planning grants, especially for more speculative rail port projects, help future potential applicants have a more realistic understanding of the potential benefits and risks of an infrastructure project and result in better quality projects for applicants and a better use of limited state funding if or when an applicant is awarded a grant or loan for an infrastructure project.

- The Federal Railroad Administration approached the Department about developing an agreement to assist railroads in accessing available federal loans, which require certain out-of-pocket expenses. States are encouraged to participate in these expenses. Eligibility of loan development costs, whether through a private or federal source for otherwise qualifying projects, will be another way to leverage limited state funds while meeting the objective of encouraging rail development and improvements.

- Adding an allowance for an advance eligibility exemption to maintain the eligibility of costs if funding is later awarded allows applicants, with approval, to complete certain preliminary project activities (such as clearing and grading). Allowing these preparatory activities before an agreement is reached prevents the possible loss of a construction season in project completion. Faster project completion benefits the awardee and the Department, and the terms of the exemption protect the Department from risk.

- The Department has had a number of projects which have been stalled or delayed, leaving funds obligated but unused. Adding time frames for each step of the process following an award is expected to mitigate delays in utilizing funding. This change will result in more timely completion of projects and, particularly in the case of loans, establish a repayment schedule more rapidly, making better use of limited state funds to support rail development.

- Some applications pledge that the project will create or retain a certain number of jobs and are scored on that criterion. This rule making formalizes the process for verification of those claims and defines acceptable performance. If an applicant fails to meet acceptable performance in the creation of jobs, a repayment of the funds will be requested. This requirement builds in accountability for the

recipients of awards and protects the state's investment by ensuring that development associated with the award occurs.

The following list explains each amendment:

Item 1 amends rule 761—822.1(327H) to include the purpose of the program so that the introduction and purpose are included in the same rule. Item 4 rescinds rule 761—822.4(327H), the current rule which describes the purpose of the program. Item 1 also updates the citation to Iowa Code section 327H.20A to remove an unnecessary reference to 2009 Iowa Acts.

Item 2 amends rule 761—822.2(327H) regarding definitions. The definition of “rail facilities” is amended to include transload yards, railroad bridges, railroad scales and other railroad infrastructure to address common questions received from potential applicants on what is included as a “rail facility.” A new definition of “rail port” is added. In 2011, a special appropriation was made to assist in the development of rail ports. Grants under this appropriation were administered by the program manager under revised guidelines. The amendment formalizes the definition of a rail port for later inclusion as an eligible project for this program (Item 7).

Item 3 amends rule 761—822.3(327H) to state that program information and application forms are available on the Department's website and that completed applications shall be submitted as directed in the application materials. The telephone number for the Office of Rail Transportation is also corrected. The applications on the Department's website are designed to be computer fillable and include an email link for submitting applications to the program manager. This process benefits both the applicant and the program manager in storing, retrieving, and archiving digital files.

Items 4 and 5 rescind and reserve rules 761—822.4(327H) and 761—822.6(327H). As stated above, part of rule 761—822.4(327H) is revised and incorporated into rule 761—822.1(327H) to include both the introduction and the purpose of the rule. Rule 761—822.6(327H) concerning project criteria is rescinded, and the information is clarified and incorporated into rule 761—822.8(327H) in order to make program cost eligibility clearer to applicants.

Item 6 amends rule 761—822.7(327H) to clarify the responsibility of eligible applicants. A sole applicant or one of the applicants in a joint application must be fiscally responsible for any awarded grants or loans. Joint applications are encouraged. However, if a joint application is the recipient of an award, the designated party shall be the fiscal agent working with the Department. This would include fiscal responsibility throughout the project: agreements, project administration, and loan or default payments. Other arrangements for cost sharing or financial responsibility would need to be worked out between the joint applicants and not the Department. Similarly, the Department cannot transfer or assign fiscal responsibility to a party other than the applicant. Some past applicants have not clearly understood the financial responsibilities associated with an award. The amendment clarifies that complex multiparty agreements or the transfer of fiscal responsibility to a third party is not acceptable under this program.

Item 7 amends rule 761—822.8(327H), which explains eligible and ineligible project costs. The list of activities or items that are eligible for funding is expanded to include feasibility or planning studies. Studies have been found to be particularly beneficial for proposed developments of complex, speculative or rail port projects and are now an eligible cost. A legislative “set-aside” in 2011 allocated a portion of the Railroad Revolving Loan and Grant Fund Program appropriation for studies. Since that time, it has proven valuable to fund certain studies which can verify or refute the potential success and benefits of a proposed project, which can ultimately lead to better developments or discourage investments that are less likely to succeed. In addition, loan development costs that a Class II or III railroad may have in obtaining a loan for a project that would have otherwise qualified under this chapter are added to the list as a way to further leverage federal or private funding, as explained previously. The list of ineligible costs is amended to address questions frequently received from applicants about which costs are or are not eligible. Item 7 strikes feasibility studies from the list since they are now added as an eligible cost. Since the program is focused on economic development and improvement of the freight transportation system, other rail costs are clearly stated as ineligible, including facilities solely used for historical or tourist railroad activities; capital or operating costs associated with passenger rail, commuter rail or public transit; and acquisition or capital costs associated with recreational trails, which are often built upon abandoned railroad rights-of-way. Environmental studies and design and engineering costs are

ineligible as stand-alone projects but are eligible as a part of a construction award under this program so that investments are targeted to completed infrastructure and not preparatory-only activities. Surface repair or replacement and crossing protection are ineligible as stand-alone projects because there are independent funding sources for those stand-alone improvements but are eligible if the improvement is a necessary part of a larger construction project. Item 7 also adds new subrule 822.8(3) pertaining to an advance eligibility exemption. An applicant may request a written advance eligibility exemption from the Department for specified costs incurred prior to an award or agreement, such as land acquisition, advance design costs, clearing and grubbing, i.e., activities preparatory to the installation of the rail infrastructure. If granted, the exemption will permit the specified eligible expenditure(s) by the applicant without jeopardizing the project's eligibility for future funding approval. Granting an exemption shall not imply or guarantee that the Department will fund a subsequent application. An advance eligibility exemption must be requested and approved prior to the expenditure; any cost incurred before a written exemption is granted will be ineligible for reimbursement. Allowing these preparatory activities prevents the possible loss of a construction season in project completion. Faster project completion benefits both the awardee, who can derive the benefit from the improvement, and the Department in managing the fund balances and making the best use of limited funding.

Item 8 amends rule 761—822.10(327H) concerning project applications. Item 8 provides that applications may be submitted at any time and the Office of Rail Transportation will hold the applications until the next evaluation cycle, and that when sufficient funds are available, a notice of funding availability is published on the Department's website. An email is sent to past applicants, railroads in Iowa, economic development professionals, cities, counties, municipal planning organizations, regional planning affiliations and others who have inquired about the program. The email announces the notice of funding availability and directs recipients to the website for complete information. The notice will include a deadline for applications and the approximate amount of funding available. Applications may be electronically submitted to the Department or sent to the Office of Rail Transportation. This item also requires a location map and a project plan or drawing to be submitted with the application. Item 8 also amends the justification needed for the project to require specific information which demonstrates the benefits the project will provide and a cost estimate for project construction or feasibility planning studies. If a loan is requested, the proposed loan term and interest rate are not needed on the application because loan terms are now determined by the Department and included in the program guidelines for an evaluation cycle. If the project is for a new or expanded development, a letter from the serving railroad(s) indicating the railroad(s) that will serve the planned development is required as part of the application to ensure that coordination with the railroad about the design and extent of the development has occurred and that the railroad's standards have been met in order to serve the facility.

Item 9 amends rule 761—822.11(327H) to clarify that the Department will request additional application information if necessary to understand the project. This item also states that projects involving job creation which do not meet 100 percent of the annual laborshed wage rate for their area will not be considered in order to ensure that any jobs created are "high-quality jobs" for the area of the project. Item 9 also changes the word "preserved" to "retained" to clarify that the Transportation Commission may review the number of new and retained jobs when deciding which projects will receive funding awards.

Item 10 rennumbers rule 761—822.12(327H) as 761—822.13(327H).

Item 11 adopts new rule 761—822.12(327H) concerning award acceptance to formalize a recent addition to the process. In some cases, the Transportation Commission approves an award for less than the requested amount, and the 45-day award acceptance process allows an awardee the time to arrange additional funding or opt out of the award if additional funding to complete the project is unavailable. In other cases, hurdles to the project which threaten completion may have developed since the application process began. The addition of the award acceptance process within a specified period of time helps ensure that projects are ready to move forward without unnecessary delay.

Item 12 amends renumbered rule 761—822.13(327H) to provide additional information that must be included in the agreement. The agreement will specify the approved process for any consultant selection related to the project to ensure the selection meets the Department's standards. Loan repayment terms

have always been a part of an agreement but were not previously stipulated in the rule. A requirement that the agreement be executed within 180 days following acceptance of the award was recently added to the agreements in order to move the project forward toward construction. Similarly, a project completion date has been added to minimize delays. Both the agreement and completion timelines can be extended for good cause. Since the program functions as a revolving fund, these timelines minimize the obligated but unused funds in the account and ensure that any loan repayments begin in a timely manner, making the best use of limited funding. Extended delays in agreement negotiations and delayed construction have been relatively common in the past, and the added timelines provide a tool to minimize these delays. This item also amends renumbered subrule 822.13(4), which spells out the remedies that can be taken for an unfulfilled project agreement. This amendment clarifies that the Commission (and not the Department) may revoke a funding commitment, require repayment or do both when an award recipient has not fulfilled the terms of the agreement. This amendment also provides the Commission recourse if a project does not meet requirements and increases accountability.

Item 13 amends the chapter's implementation sentence to remove an unnecessary reference to 2009 Iowa Acts.

Public Comment and Changes to Rule Making

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on April 25, 2018, as **ARC 3759C**. No public comments or requests for oral presentations were received. No changes from the Notice have been made.

Adoption of Rule Making

This rule making was adopted by the Department on June 12, 2018.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the person's circumstances meet the statutory criteria for a waiver may petition the Department for a waiver under 761—Chapter 11.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rule making will become effective on August 8, 2018.

The following rule-making actions are adopted:

ITEM 1. Amend rule 761—822.1(327H) as follows:

761—822.1(327H) Introduction and purpose. The railroad revolving loan and grant fund program provides funding in the form of loans and grants for railroad-related improvement projects ~~that~~. The purpose of the program is to spur economic development and job growth and provide benefits to Iowa

through economic benefits derived from railroad transportation system or service improvements. The railroad revolving loan and grant fund is established in Iowa Code section 327H.20A as amended by 2009 Iowa Acts, Senate File 151, section 11, and is under the control of the department.

ITEM 2. Amend rule 761—822.2(327H) as follows:

761—822.2(327H) Definitions.

“Rail facilities” includes railroad main lines, branch lines, switching yards, sidings, rail connections, transload yards, intermodal yards, and highway grade separations, railroad bridges, railroad scales and other railroad infrastructure.

“Rail port” means a commercial or industrial development that has the potential to provide rail service to multiple users through shared rail infrastructure, including transload or intermodal yards.

ITEM 3. Amend rule 761—822.3(327H) as follows:

761—822.3(327H) Information. ~~Information~~ Program information and application forms are available on the department’s website at www.iowadot.gov. Completed applications shall be submitted as directed in the application materials. Assistance may be obtained at the following address: Office of Rail Transportation, Iowa Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010; telephone (515)239-1140 (515)239-1066. ~~Completed applications shall be submitted to this address.~~

ITEM 4. Rescind and reserve rule 761—822.4(327H).

ITEM 5. Rescind and reserve rule 761—822.6(327H).

ITEM 6. Amend rule 761—822.7(327H) as follows:

761—822.7(327H) Applicant eligibility. A railroad company, railroad user, city, county, metropolitan planning organization, regional planning affiliation, or any other entity with an interest in a rail transportation improvement is eligible to apply for funding. The applicant shall be fiscally responsible for any awarded loans or grants. Joint applications are allowed and encouraged, but ~~the applicants shall designate one contact person~~ joint applications shall designate one entity that shall be fiscally responsible for any awarded loans or grants.

ITEM 7. Amend rule 761—822.8(327H) as follows:

761—822.8(327H) Eligible and ineligible project costs.

822.8(1) Eligible costs. Activities or items eligible for funding include, but are not limited to, the following:

- a. Modernization, upgrading or reconstruction of existing rail facilities or rail ports.
- b. Construction of new rail facilities or rail ports.
- c. and d. No change.
- e. Feasibility studies or planning studies for proposed projects that are otherwise eligible.
- f. Loan development costs that a Class II or III railroad may have in obtaining a loan for a project that would have otherwise qualified under this chapter.

822.8(2) Ineligible costs.

- a. The following activities or items are ineligible for funding:
 - ~~a. (1)~~ Contract administration.
 - ~~b. (2)~~ Freight car or locomotive lease, purchase or repair.
 - ~~c. Feasibility studies, environmental studies or major investment studies related to a railroad improvement project.~~
 - d. (3) Refinancing of a completed project that would have otherwise qualified under this chapter.
 - (4) Facilities solely used for historical or tourist railroad activities.
 - (5) Capital or operating costs associated with passenger rail, commuter rail or public transit.
 - (6) Acquisition or capital costs associated with recreational trails.

b. The following costs are ineligible unless the costs are part of a larger construction award under this program:

- (1) Design and engineering.
- (2) Environmental studies.
- (3) At-grade crossing surface repair or replacement.
- (4) Signals, gates or other crossing protection.

822.8(3) Advance eligibility exemption. No part of a project may be under construction prior to a signed and executed agreement. Certain preliminary costs may be eligible for an advance eligibility exemption, if the exemption is requested in writing and granted by the department in writing. If granted, an exemption will permit a specified expenditure by the applicant without jeopardizing the project's eligibility for future funding approval. Granting an exemption shall not imply or guarantee that the department will fund a subsequent application. An advance eligibility exemption must be requested and approved prior to the expenditure; any cost incurred before a written exemption is granted will be ineligible for reimbursement.

ITEM 8. Amend rule 761—822.10(327H) as follows:

761—822.10(327H) Project application.

822.10(1) Submission. Applications may be submitted at any time and will be held until the next evaluation cycle.

a. The applicant shall submit an original and two copies of a project application to the address in rule 761—822.3(327H). A notice of funding availability will be published on the department's website when funding is available. The notice will include the approximate amount of funding available and a deadline for consideration of applications.

b. An applicant shall submit the appropriate application on the prescribed forms either electronically to the email address included in the application or to the address in rule 761—822.3(327H).

~~b. c.~~ If an application is incomplete, department staff shall return the application to the applicant to be resubmitted when it is complete.

~~c. d.~~ An application may be withdrawn at any time after submission.

822.10(2) Contents of application. Each application shall contain the following:

a. No change.

b. A detailed description of the project proposed for funding, including a location map or sketch and a project plan or drawing.

c. The justification for the project, including the following information:

(1) No change.

(2) How the project will impact the local and state economies, including the number of new jobs to be created, the number of potential jobs that may be created and the number of jobs to be retained as a result of the project. Specific information demonstrating that the proposed project will provide benefits to Iowa in terms of direct economic development and job growth or retention or through economic transportation or other benefits derived from railroad transportation system or service improvements. Benefits are to be quantified whenever possible.

~~(3) The long-term growth and development potential of the area or industry to be supported and the direct and indirect economic, transportation, and environmental impacts of the project.~~

d. An itemized estimate of all project or planning study costs and the proposed match or cost sharing based on the requested funding. A detailed financial plan to explain the funding for the entire project should be included, along with any associated development costs.

e. and f. No change.

g. If loan funds are requested, ~~the proposed loan term and interest rate and~~ a detailed description of the applicant's ability to repay the loan. Department staff may require the applicant to provide audited financial statements for the past two years plus a current balance sheet and profit/loss statement for the entity that is to repay the loan. If the entity that is to repay the loan is a new entity, the applicant shall, instead, provide a pro forma balance sheet and pro forma profit/loss statement.

h. No change.

i. If the project is a new or expanded development, a letter from the serving railroad(s) indicating that the railroad(s) will serve the planned development.

ITEM 9. Amend rule 761—822.11(327H) as follows:

761—822.11(327H) Project evaluation and approval.

822.11(1) *Staff review.* Department staff shall review the contents of each application ~~for completeness~~ and request any additional information necessary to understand the scope and benefits of a project. Projects involving job creation which do not meet 100 percent of the annual laborshed wage rate for their area will not be considered. Department staff may visit the project site and may require the applicant to verify the information in the application. After department staff determines that the application is complete, the staff shall develop a funding recommendation and shall schedule the project for submission to the transportation commission for approval.

822.11(2) No change.

822.11(3) *Commission approval.* In making its decision to fund a project, the transportation commission may consider the railroad transportation service benefits of the project, the economic development benefits of the project, the applicant's total capital investment, the number of direct and indirect jobs to be created or ~~preserved~~ retained by the project, the financing requested, an analysis of public benefits versus public costs, and other potential impacts or benefits of the project.

ITEM 10. Renumber rule **761—822.12(327H)** as **761—822.13(327H)**.

ITEM 11. Adopt the following new rule 761—822.12(327H):

761—822.12(327H) Award acceptance. After the transportation commission approves the project, department staff shall notify the applicant of the amount of the award. The applicant shall either accept or reject the award in writing within 45 days.

ITEM 12. Amend renumbered rule 761—822.13(327H) as follows:

761—822.13(327H) Project agreement and administration.

822.13(1) *Agreement.* After the ~~transportation commission has approved funding~~ applicant has accepted the award for a project, department staff shall negotiate and execute an agreement with the applicant. Department staff shall administer the agreement.

a. No change.

b. As applicable, the agreement shall address responsibilities for consultant selection, project design, right-of-way acquisition, contracting, construction and materials inspection; documentation required for reimbursement of project costs; loan repayment terms; audit requirements; and maintenance of the completed project.

c. The applicant shall execute the agreement within 180 days following the acceptance of the award. The applicant may request an extension, and department staff may approve an extension for good cause. Failure to execute an agreement within the specified time may result in forfeiture of the award.

822.13(2) and 822.13(3) No change.

822.13(4) *Default Remedies for noncompliance with project agreement.* ~~Department staff~~ The commission may revoke a funding commitment, ~~seek~~ require repayment of funds loaned or granted or take both actions if when the applicant fails to fulfill has not fulfilled the terms of the project agreement.

ITEM 13. Amend **761—Chapter 822**, implementation sentence, as follows:

These rules are intended to implement Iowa Code section 327H.20A ~~as amended by 2009 Iowa Acts, Senate File 151, section 11.~~

[Filed 6/13/18, effective 8/8/18]

[Published 7/4/18]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 7/4/18.